In the Supreme Court of the United States.

OCTOBER TERM, 1921.

THE UNITED STATES OF AMERICA
v.
OREGON LUMBER COMPANY, JOSEPH BARTON, FREDERICK H. ATKINSON, AND FRANK M. SHURTLIFF. } No. 245.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The United States brought a suit at law in the United States District Court for the district of Oregon against the Oregon Lumber Company and others to recover the value of certain lands in that state patented under the timber and stone act (Act of June 3, 1878, c. 151, 20 Stat. 89).

The basis upon which recovery was sought was that the patents were secured fraudulently as a result of a conspiracy between the defendants whereby it was agreed that persons would be secured to make applications under the timber and stone act, not as

required by the act for their own use and benefit, but for the benefit of the Oregon Lumber Company, and when the proof required under the law had been made, would convey to the representative of the company who would thereafter transfer the company.

Answering the complaint, the defendants made what amounts to a general denial and also set up three separate defenses, two of which only are necessary to be considered for the purposes of this case. They were in substance: (1) The amount which the United States received from the several entrymen as the price fixed by law for the lands should be deducted from any damages awarded; (2) that in October, 1912, the United States brought a suit in equity seeking the cancellation of the patents to the same lands involved in this suit; the basis of the bill in that case was the same as in this case; issue was joined, and in 1916, after hearing upon the merits, the bill was dismissed by the trial court for the reason that the United States had full knowledge of the matters complained of more than six years prior to the filing of the bill; that no appeal was taken from that decision.

To these defenses the United States demurred, but the demurrer was overruled, and the United States declining to plead further the complaint was dismissed, the court holding that the bringing of the equity suit constituted an election by the United States, final and conclusive.

Whereupon, the United States sued out a writ of error from the Circuit Court of Appeals and that

court has certified to this court, under section 239 of the Judicial Code, the following questions (R. 2):

> 1. Is an action by the United States for the value of lands as damages, against the patentees for the lands for fraudulent acquisition of the lands patented under the timber and stone act, barred where more than six years have elapsed after the United States, with knowledge of the fraud, brought a suit in equity to cancel the patents for the same lands, in which equity suit decree of dismissal was made against the United States on the ground that the suit was barred by the statute of limitations?
>
> 2. If the foregoing question be answered in the negative, should any damages recoverable be reduced by such amounts as the United States may have received from the entrymen, as the price fixed by law for the lands described in the patents?

ARGUMENT.

I.

Is an action by the United States for the value of lands as damages, against the patentees for the lands for fraudulent acquisition of the lands patented under the timber and stone act, barred where more than six years have elapsed after the United States, with knowledge of the fraud, brought a suit in equity to cancel the patents for the same lands, in which equity suit decree of dismissal was made against the United States on the ground that the suit was barred by the statute of limitations?

This question as framed by the Circuit Court of Appeals is ambiguous, and without the context

containing a statement of the case would be susceptible of several interpretations.

We think it plain that the court does not mean to ask whether a suit at law brought by the Government to recover damages for fraud in procuring patents is barred because more than six years have elapsed since the patents were issued or the fraud discovered. That question is settled by *United States* v. *Whited & Wheless*, 246 U. S. 552. Neither can the court be inquiring whether such a suit at law can be maintained more than six years after the institution of a suit in equity to cancel those patents, since the statement of the case (R. 1) shows that the suit at law was commenced in February, 1918, less than six years after the institution in October, 1912, of the equity suit.

The question presented to the Circuit Court of Appeals in this case and, as we understand, upon which it seeks the instruction of this court, is this:

Is a suit at law by the United States to recover the value of lands, patents to which were obtained through fraud, barred because of the fact that previously an equity suit to cancel those patents had been instituted, which equity suit was dismissed on a plea in bar?

Or, in shorter form, did the bringing of that equity suit and its dismissal because barred constitute an election of remedies?

It is settled law that the doctrine of election of remedies is applicable only where a suitor has *inconsistent* remedies available. When he pursues one

of them, he is bound by his election even if that remedy be not efficacious. *Robb* v. *Vos*, 155 U. S. 13, 41 *et seq.*

It is equally well settled that there can not be an election unless inconsistent remedies are available; that the pursuit of a remedy which a party may think himself entitled to, but to which it develops he is not, does not bar the bringing of a suit on the remedy which does exist. *Northern Assurance Co.* v. *Grand View Building Association*, 203 U. S. 106; *Bierce* v. *Hutchins*, 205 U. S. 341, 347; *Southern Pac. Co.* v. *Bogert*, 250 U. S. 483, 490, 491; *Bistline* v. *United States*, 229 Fed. 546.

We contend the case comes within the last stated rule. When the United States filed its bill in equity to secure the cancellation of the patents, it was met with a plea by the defendants that the suit was barred because not brought within six years from the date the patents were issued. Act of March 3, 1891, c. 561, § 8, 26 Stat. 1095, 1099. The Government asserted that the suit was not barred because it was brought within six years after it had received notice of the fraud. Cf. *Exploration Co.* v. *United States*, 247 U. S. 435. The case went to trial and the court held the suit barred because the United States had notice of the fraud more than six years before suit was filed. It therefore dismissed the bill on that ground.

It is very clear, therefore, that when the suit in equity was filed the United States did not have a right to the remedy therein sought, namely, the can-

cellation of the patents. Hence, its course in pursuing that supposed remedy does not bar the prosecution of the present suit at law to recover the value of the land.

It is no answer to that proposition to say that when the suit was brought the facts respecting notice were known, or, to be more exact, that knowledge was chargeable to the United States. Granting that they were known, whether those facts constituted such notice as would operate to set the statute of limitations in motion was a question of law, and because the United States thought the statute not applicable, would not militate against the prosecution of the present suit, its mistake being due to an erroneous view of the law.

To elaborate: Suppose in the equity suit it had been shown that certain matter relative to the fraudulent transactions of the Oregon Lumber Company was on file in the General Land Office, and because of that, the defendants had claimed that the statute of limitations was operative; suppose, also, that the United States contended that this was not such as to constitute notice, and further it was not enough that it be in the General Land Office but it must have been communicated to the Attorney General in order to start the statute, since the Attorney General was the official of the Government authorized to institute legal proceedings on its behalf. The determination of the question whether the Government had notice would be one of law. If the court held against the United States, could it be seriously con-

tended that because the latter had entertained an erroneous view of the law, its right to recover in this action for the fraud perpetrated was barred? As a matter of fact, the supposed case is really the situation which developed in the equity suit.

The law has not gone so far as to deprive parties of meritorious claims merely because of attempts to collect them by inappropriate action, upon which recovery could not be had. *McLaughlin* v. *Austin*, 104 Mich. 489, 491. If the rule were otherwise, a mere mistake of judgment would result in depriving one of valuable rights. *Agar* v. *Winslow*, 123 Calif. 587, 592.

The instant case closely resembles *Bistline* v. *United States*, 229 Fed. 546. There the United States brought suit against Bistline to recover damages for false and fraudulent acquisition of certain public lands patented to him. It appears that previously the United States had brought a suit in equity to cancel the patent, but the defendant's answer showed the lands to have been conveyed to persons not made parties to the suit. Whereupon the bill was dismissed and the suit at law instituted. The defendant asserted that that suit was barred on the ground that the United States had elected its remedy. The court held otherwise, and upon error the Circuit Court of Appeals affirmed that holding.

Another case in point is *Tullos* v. *Mayfield*, 198 S. W. (Tex. Civ. App.), 1073. There a vendor after default in payment of lien notes brought an action to try title to the land for which the notes were security.

That action failed because it was held to be barred by a statute of limitations; thereafter, he sued on the notes. The doctrine of election of remedies was invoked in defense of this second suit but was held not applicable (p. 1074). Cf. *Stone* v. *Robinson*, 218 S. W. (Tex. Civ. App.), 5, 6.

The statute of limitations invoked in the equity suit merely barred the remedy but did not extinguish the right of the Government to recover the value of the lands. *United States* v. *Whited & Wheless*, 246 U. S. 552.

Again, the fact that the Government pursued the equity suit to judgment when met with the plea in bar, does not make that judgment *res judicata* in the instant suit, for the sole question decided there was the applicability of the statute of limitations. That was no adjudication of the rights of the Government but only of the availability of the remedy. Statutes of limitation affect the remedy, not the merits. *Townsend* v. *Jemison*, 9 How. 406, 412; *McElmoyle* v. *Cohen*, 13 Pet. 312, 326. A judgment not on the merits is not *res judicata*. *Cromwell* v. *County of Sac*, 94 U. S. 351, 352.

Furthermore, we suggest that there is not such inconsistency between a suit to recover the lands patented because of fraud and a suit to recover damages for the fraud, as to bar prosecution of the latter. *Friederichsen* v. *Renard*, 247 U. S. 207, 211, 212. In that case it was distinctly pointed out that in a bill in equity to recover lands fraudulently pro-

cured, an alternative prayer might be made for the value of the lands.

The court referring to the doctrine of election of remedies, said (p. 213):

> At best this doctrine of election of remedies is a harsh and now largely obsolete rule, the scope of which should not be extended.

II.

If the foregoing question be answered in the negative, should any damages recoverable be reduced by such amounts as the United States may have received from the entrymen, as the price fixed by law for the lands described in the patents?

Section 2 of the timber and stone act, *supra*, provides that one applying to purchase lands thereunder shall file with the register of the proper district land office a written statement in duplicate, verified by oath of the applicant, setting forth among other things:

> that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person except himself, * * *

It is further provided:

> and if any person taking such oath shall swear falsely in the premises, he shall be subject to all the pains and penalties of perjury, and shall

> forfeit the money which he may have paid for said lands, and all right and title to the same; and any grant or conveyance which he may have made, except in the hands of bona-fide purchasers, shall be null and void.

In the face of this express provision for forfeiture of the purchase price, it is obvious that no claim can be made either for its direct return, or as an offset in a suit to recover the value of lands acquired through false swearing.

In *Emmons* v. *United States*, 175 Fed. 514, the question was presented of the right to recover the purchase money paid in connection with entries under the timber and stone act, which had been canceled for fraud. It was contended that no forfeiture of the moneys could be adjudged previous to conviction for perjury. The court, after quoting that part of the statute declaring the purchase money forfeited, said (p. 516):

> Thus are imposed upon the claimant two conditions—the one that he shall be subject to the pains and penalties of perjury, and the other that he shall forfeit the money paid for the lands. Each condition is distinct, and not one dependent upon the other; or the party may suffer the penalty of both conditions.

Cf. *Mery* v. *Brodt*, 121 Calif. 332, 338.

This court, in *United States* v. *Minor*, 114 U. S. 233, considered the question whether in a suit in equity to annul a patent issued under the preemption law (Act of September 4, 1841, c. 16, 5 Stat. 453, 456;

R. S. 2257 *et seq.*) it was necessary for the Government to tender a return of the purchase money. The preemption act contained, section 13 (R. S. 2262), a provision for forfeiture strikingly similar to that in the timber and stone act. It was said (p. 238):

> * * * the provision of the section above mentioned, that the person who makes the false oath in the premises shall forfeit any money he may have paid for the land, answers in the negative the fourth question, namely, is the United States bound to offer in the bill, in a case like this, to return the purchase money? The statute declares it is forfeited, and, though the party may lose the land, he also loses his money as a penalty of his perjury.

CONCLUSION.

Both questions certified should be answered in the negative.

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H. L. UNDERWOOD,
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MARCH, 1922.

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v.

OREGON LUMBER COMPANY, JOSEPH BARTON, FREDERICK H. ATKINSON and FRANK M. SHURTLIFF.

On a Certificate from the United States Circuit Court of Appeals for the Ninth Circuit

STATEMENT

In October, 1912, the United States brought suit against the defendants in this proceeding to set aside certain land patents, alleging that the United States owned the property and that through fraud practiced by the defendants and others in the year 1899 the lands were patented to the applicants therefor under the timber and stone act in the year 1900. To this suit the defendants, among other things, pleaded the statute of limitations, upon which issue was joined, and in the year 1916, after trial upon the merits, the District Court dismissed the equity suit for the reason that the United States had had full knowledge of the matters complained of in its complaint for more than six years before the equity suit was instituted. No appeal was prosecuted from this decree. Thereafter, in February, 1918, the United States filed an action at law against the defendants, alleging the same facts

that had been alleged in the equity suit, except that in the action at law it was alleged that title had passed by the patents and judgment was asked for the alleged value of the lands, to-wit, $65,000. The defendants answered, and after denying the material allegations of the complaint pleaded two defenses that are brought up by this certificate: (1) That there should be offset against the damages claimed the sum of $16,400 paid to the United States by the several entrymen for the lands patented; and (2) that by bringing the equity suit and disaffirming the patents the United States elected to pursue a remedy inconsistent with the present action for damages, which was thereby waived.

The certificate from the Circuit Court of Appeals for the Ninth Circuit asks (1) whether under the foregoing facts the action at law is barred, and (2) whether if the action is not barred the defense *pro tanto* to the measure of damages should be allowed.

It is apparent from the certificate that the plaintiff when it brought the equity suit had complete knowledge of the facts and of its rights in the premises. It affords no basis for a contention that a mistaken remedy was pursued, but presents in a clean cut manner the question whether eighteen years after land is fraudulently acquired the grantor may press an action for damages for the value of the land, when such grantor had prior thereto instituted a suit to rescind the contract of sale, which failed because the statute of limitations had run; also whether under the timber and stone act the amount paid by entrymen for the lands patented can be offset against a common law claim for the value of the land fraudulently obtained.

The foregoing sufficiently states the facts forming the basis of the certificate of the Circuit Court, as to which defendants make the following contentions:

1—When the United States, with knowledge of the facts and its rights in the premises, sued to cancel the land patents alleged to have been fraudulently obtained, it waived claims for the value of the land as damages based upon the inconsistent assertion that the patents passed title.

2—Under the practice in the Federal Courts plaintiff is doubly bound by its election. After the defects of the statute of limitations had been pleaded against the complaint to cancel patents, and even after the evidence in support of that defense had been taken, plaintiff had an election to continue the equity suit or to change to the law side of the court. Adherence to the original election until after decree is fatal to plaintiff's present action.

3—This is a common law action for damages in which the United States in its proprietary capacity is suing for the value as damages of the land alleged to have been fraudulently obtained. There is no statute governing the action and the common law measure of damages is applicable—the difference between the price paid and the actual value of the land at the time of sale.

I

When the United States, with knowledge of the facts and its rights in the premises, sued to cancel the land patents alleged to have been fraudulently obtained, it waived claims for the value of the land as damages based upon the inconsistent assertion that the patents passed title.

While often referred to as "estoppel by election," the doctrine of election of remedies is based upon waiver. Its application does not depend upon the existence of those incidents of injury or gain that are inseparably a part of equitable estoppel.

Robb v. Voss, 155 U. S. 13; 39 L. Ed. 52, 62.
Kennedy v. Manry, 6 Ga. App. 816; 66 S. E. 29.
Connihan v. Thompson, 111 Mass. 270, 272.
20 Corpus Juris. 4.

An excellent discussion of the distinction is found in *Kennedy v. Manry, supra,* from which we quote:

> "The defense of the defendant in error does not depend upon the equitable doctrine of estoppel in pais, the essentials of which we have noted above, but rather upon the plaintiff's election of a remedy inconsistent with the one he now seeks to assert, whereby he waived his right to assert, a right which he possessed, independently of its effect upon the other party. * * *
>
> "Waiver is voluntary and intentional, and estoppel in pais may be involuntary and unintentional. Estoppel results from an act which may operate to the injury of the other party; waiver may affect the opposite party beneficially. 'Waiver in a voluntary relinquishment of a right.' French v. Seamans, 21 Misc. Rep. 722, 726; 48 N. Y. Supp. 9, 13. 'Waiver is a voluntary relinquishment of some known right, benefit, or advantage. which, except for such waiver, the party otherwise would have enjoyed.' Peabody v. Maguire, 79 Me. 572, 585, 12 Atl. 630; Austin v. Welsch, 31 Tex. Civ. App. 526, 73 S. W. 881; Dailey v. Kennedy, 64 Mich. 208, 31 N. W. 125;

Cowenhoven v. Ball, 118 N. Y. 234, 23 N. E. 470. The doctrine is well stated as follows in Robb v. Voss, 155 U. S. 13, 15 Sup. Ct. 4, 39 L. Ed. 52: 'The benefits of 'waiver by election' arise where the remedies are inconsistent, as where one action is founded on an affirmance, and the other upon the disaffirmance, of a voidable contract or sale of property. In such cases any decisive act of affirmance or disaffirmance, if done with knowledge of the facts, determines the legal right of the parties, once for all. The institution of a suit is such a decisive act by a party with knowledge of his rights under the facts as determines his election in the case of inconsistent remedies.' See, also,McNutt v. Hilkins, 80 Hun. 235, 29 N. Y. Supp. 1047, 1049; Welsh v. Carder, 95 Mo. App. 41, 68 S. W. 580. Waiver belongs to the family of estoppel in a sense, and yet an estoppel in pais has connections that are no kin to waiver. Waiver depends upon what one himself intends to do; estoppel depends rather upon what he caused his adversary to do. Estoppel may carry the implication of fraud; waiver, by election, does not. Estoppel may arise even as between consistent remedies; for waiver by election to operate as a bar, the remedies must be inconsistent."

Applied to litigation, election of remedies is grounded upon the proposition that a defendant who has injured another has some rights, among them being the right to be subjected to but one litigation. Its office is to prevent a plaintiff speculating on the court's decision until it is adverse, and then subjecting defendant to another litigation based upon the same facts. The rule goes but a short way. It merely denies the right to pursue *inconsistent* remedies. It is based upon the same rule that denied a plaintiff the right to harass a defendant with several

inconsistent law suits at one and the same time (*Butler v. Wehle, 4 Hun. 54; Livingstone v. Kane, 3 Johns Ch. 224*). As applied to successive litigations its purpose is well stated in the following language by the court in *Bolton Mines Co. v. Stokes, 82 Md. 50; 33 Atl. 491:*

> "The obvious principle which underlies this class of cases must, therefore, be that, when a party has deliberately selected his form of action, and has pursued it to a final judgment—and whether that judgment be for or against him is wholly immaterial—he shall not be at liberty to again vex the same defendant with another suit in a different form of action, for the identical demand involved in, and passed upon by, the antecedent litigation."

The general rule is that an election is made finally and conclusively when manifested by any overt act. By the weight of authority the institution of a suit is such an act.

Bierce v. Hutchins, 205 U. S. 340; 51 L. Ed. 828, 833.

> "Election is simply what its name imports; a choice shown by an overt act, between two inconsistent rights, either of which may be asserted at the will of the chooser alone. Thus, 'if a man maketh a lease, rendering a rent or a robe, the lessee shall have the election.' Co. Litt. 145a. So a man may ratify or repudiate an unauthorized act done in his name. Metcalf v. Williams, 144 Mass. 452, 454, 11 N. E. 700. He may take the goods or the price when he has been induced by fraud to sell. Dickson v. Patterson, 160 U. S. 584; 40 L. Ed. 543, 16 Sup. Ct. Rep. 373. He may keep in force or may avoid a contract after the breach of a condition in his favor. Oakes v. Manufacturers' F. & M. Ins. Co., 135 Mass. 248,

249. In all such cases the characteristic fact is that one party has a choice independent of the assent of anyone else."

Robb v. Voss, 155 U. S. 13; 39 L. Ed. 52, 62.

"The rule established by these cases is that any decisive act by a party, with knowledge of his rights and of the facts, determines his election in the case of inconsistent remedies, and that one of the most unequivocal methods of showing ratification of an agent's act is the bringing of an action based upon such an act."

In re Garver, 176 N. Y. 386; 68 N. E. 667, 669.

"It would hardly seem that authority is necessary to support the proposition that whether there has been an election of remedies is not determinable by the result of the suit, but is by its commencement."

Oregon Mill & Grain Co. v. Hyde, 87 Or. 163; 169 Pac. 791.

Grizzard v. Fite (Tenn.), 191 S. W. 969.

Conrow v. Little, 115 N. Y. 387; 5 L. R. A. 693; 22 N. E. 346.

Connihan v. Thompson, 111 Mass. 271.

7 Enc. Pleading and Practice 364.

2 Black on Rescission and Cancellation, Sec. 563.

20 Corpus Juris 29.

15 Cyc. 259.

Just as an election is made by the institution of a suit, it does not depend for its conclusiveness upon the result of that litigation. We are not able to undertand an argument contending otherwise, for if an election is a conscious step to enforce a par-

ticular remedy taken with knowledge of the facts, then the institution of a suit certainly would be an election, and by the same token the election would not depend upon the result of the first litigation. If the result governed, there would be no need to mention election of remedies in any litigation. If an election is not made until plaintiff prevails, then the doctrine of election will not protect a defendant against the harassment of continued and repeated litigation upon one state of facts.

Bowers on the Law of Waiver, Sec. 65.
Steinbach v. Relief Fire Ins. Co., 77 N. Y. 498; 12 Hun. 640.
Marcus v. National Council of Knights and Ladies of Security, 127 Minn. 196; 149 N. W. 197.
Bach v. Tuch, 47 Hun. 536; 126 N. Y. 53; 26 N. E. 1019.
Scott v. Walton, 32 Or. 460; 52 Pac. 180.
Henry v. Herrington, 193 N. Y. 218; 86 N. E. 29.
Weeke v. Reeve, 65 Fla. 374; 61 So. 749.

We admit that there is a respectable number of authorities holding that if the first suit is dismissed *before judgment and before the elements of an equitable estoppel have intervened,* the election may be recalled. We particularly direct the attention of the court to the only conclusion that can be reached from a careful reading of all of those authorities, and that is (a) the authorities do not hold that there has not been an election by instituting the suit, but (b) they do hold that the election is not final and irrevocable but may be recalled if the suit is dismissed

before judgment and no equitable estoppel has intervened, and (c) if the necessary elements of an equitable estoppel (i. e., the position of the parties has been changed), have intervened, or *if the case has gone to judgment regardless of the result of the litigation,* then the election may not be recalled but is final.

Fraudulent acquirement of property constitutes the great bulk of cases in which courts are called upon to hold a litigant to his election of remedies. Where a conveyance of land has been fraudulently procured the injured vendor has his choice of two remedies, (a) he may rescind the sale and sue to recover his land, or (b) he may affirm the sale and bring an action for the damages sustained. He cannot pursue both remeides, and the pursuit of one with knowledge of the facts waives the right to pursue the other.

This is the rule laid down by text books treating of this subject.

Bigelow on Frauds, 65.
2 Black on Rescission and Cancellation, Sec. 562.
Bowers Law of Waiver, Sec. 65.

It is the rule in the federal courts.

Robb v. Voss, 155 U. S. 13; 39 L. Ed. 52, 62.
Stuart v. Hayden, 72 Fed. 402, 411.
In re Fitzhugh Hall Amusement Co., 228 Fed. 169.
Issenhuth v. Kirkpatrick, 258 Fed. 293.
In re Jacob Berry & Co., 174 Fed. 409.
A. Klipstein & Co. v. Grant, 141 Fed. 72.

Blakely v. Fidelity Mut. Life Ins. Co., 143 Fed. 619; 154 Fed. 43.
Supreme Council v. Lippincott, 134 Fed. 824.

It is the rule in the state courts.

Scott v. Walton, 32 Or. 460; 52 Pac. 180.
Elgin v. Snyder, 60 Or. 297; 118 Pac. 280.
Weeke v. Reeve, 65 Fla. 374; 61 So. 749.
Moller v. Tuska, 87 N. Y. 166.
Jewett v. Pettit, 4 Mich. 508 at 511.
Heastings v. McGee, 66 Pa. St. 384.
Boots v. Ferguson, 46 Hun 129; 10 N. Y. S. 761; 58 S. C. 129.
Bowen v. Mandeville, 95 N. Y. 237.
Kennedy v. Manry, 6 Ga. App. 816, 66 S. E. 29.
Fowler v. Bowery Savings Bank, 47 Hun 399; 14 N. Y. S. 515; 54 N. Y. 399; 4 L. R. A. 145.
Wheeler v. Dunn, 13 Colo. 428; 22 Pac. 827.
Avila v. Manhattan Chemical Co., 32 Hun. 1.
Holt Mfg. Co. v. Strachan, 77 Wash. 380; 137 Pac. 1006.
Kearney Milling & Elevator Co. v. Union Pac. Ry. Co., 97 Ia. 719; 66 N. W. 1059, 1060.

This doctrine has been applied in behalf of the government in actions for damages for fraudulently securing land patents.

United States v. Koleno, 226 Fed. 180.
Pitan v. United States, 241 Fed. 364.
United States v. Jones, 242 Fed. 609, 616.

On one state of facts, a suit to rescind for fraud, and an action affirming the fraudulently acquired

title and demanding damages, are incontrovertibly inconsistent.

A further condition prerequisite to holding a litigant to his election is that at the time of instituting the first litigation there were actually available two inconsistent remedies, one of which he chose. There is no room in this case to discuss "mistaken" remedies. The facts in this case as pleaded and as certified by the lower court are that plaintiff had full knowledge of the matters complained of when the suit to rescind was instituted in 1912, and had been in possession of such knowledge at that time for more than six years.

When the government commenced its suit to rescind, the statute of limitations had run. The government knew the statute had run. So knowing, the government alleged the necessary facts of lack of information to state a cause of suit for cancellation, and commenced such suit. Issue was joined and the question of governmental knowledge of the alleged fraud became a part of the merits of the case. Testimony was taken on all issues, including that of fraud, and thereafter decree was passed dismissing the bill because the court found that the government had the very knowledge the government had denied having.

Because this issue of fact was resolved against the government the latter now contends that such termination of the litigation proves that it had no remedy in disaffirmance of the patents at the time the suit was instituted.

The statute of limitations has been considered an affirmative defense. In order to take advantage of the statute as a bar, unless the complaint is subject

to demurrer, the defendant must invoke it as a defense to the action. The complaint in the previous suit to annul the patents was not open to demurrer, but stated a good cause of suit, and to rely upon the statute as a defense, the defendants were required by the rule to plead it.

The rule is stated in *25 Cyc., p. 1401,* as follows:

> "The general rule is that the statute of limitations must be invoked as a defense in some way and if it has not been urged by demurrer, and the defense is not pleaded in the answer, the statute cannot be relied on but is deemed to have been waived; and this is so even though the claim relied on is clearly barred by limitations."

Wood on Limitations (4th Ed.), page 29:

> "When a right is not of common-law origin, but is given by a statute which prescribed the time within which the right must be enforced, a complaint which on its face shows that the time limit has expired will be insufficient on demurrer. *But, where the statute merely bars the remedy upon a right which exists at common law, the statute must be pleaded."*

Similar language was used by the Supreme Court in *Gormley v. Bunyan, 138 U. S. 623; 34 L. Ed. 1086:*

> "There was no error in not allowing the Statutes of Limitation of New York and Illinois to be admitted in evidence, after the court had overruled the motion of the defendants to be allowed to plead them as a defense. The only way in which such statutes are available as a defense is when they are, at the proper time, specially pleaded. 1 Chitty on Pl. 514, 515; Stephen on Pl. 76, note; Wilson v. King, 83 Ill. 232."

A suit to annul a patent for fraud does not fall within the exception to the general rule which is stated in *25 Cyc. 1403*, as follows:

> "Where the statute operates, not merely on the remedy, but also extinguishes the right of action, it need not be pleaded. For instance, where the action is based on a statute which makes the time of bringing the action an express condition of the right given, plaintiff must plead the performance of such condition, and defendant is not required to plead the limitation in the statute to entitle him to insist on the objection that the action was not brought within the time limited."

Before the statute of March 3, 1891, was passed, there was one primary right in the government, namely, that its lands should be acquired by citizens honestly and without fraud; and for the breach of this right, the government had two remedies, a suit in equity to cancel the patent for fraud, or an action at law for damages for the fraud.

United States v. Koleno, 226 Fed. 180.

In this case the court, in discussing the opinion of the Supreme Court in *United States v. San Jacinto Tin Co., 125 U. S. 273, 31 L. Ed. 747*, holding that the attorney general had power to bring suits to annul patents, uses this language:

> "This was before the statute of limitations cited was passed, and clearly corroborates the assumption that the right to maintain the action to annul a patent was not created by the statute cited, but the statute was one purely of limitation."

In *United States v. Whited & Wheless, 246 U. S. 552, 62 L. Ed. 879,* the question is answered as follows:

> "The Statute of Limitations did not create the right of action in the government, or either of the remedies for enforcing that right. It relates to the remedy, and in terms applies only to one remedy, that for annulling the patent."

The statute of limitations here involved is an affirmative defense, and is not available until pleaded and proved.

1 Wood on Limitations (4th Ed.), Sec. 7, p. 25.
Retzer v. Wood, 109 U. S. 185; 27 L. Ed. 900.
Whitman v. Citizens' Bank, 110 Fed. 503, 512; 49 C. C. A. 122.

We contend that plaintiff in the first instance pursued a remedy which it had when suit was commenced, and that by following that suit to judgment its election became irrevocable. When the statute of limitations is made an issue in the case, the resulting judgment, even though it turns upon the statute, is a judgment on the merits.

1 Wood on Limitations (4th Ed.), Sec. 63a, p. 304.
Lilly Brackett Co. v. Sonnemann, 157 Cal. 192; 106 Pac. 715.
Wheeler v. Castor, 11 N. D. 347; 92 N. W. 381, 385.
Garvie v. Green, 9 S. D. 608; 70 N. W. 847, 848.
Ellinger's Appeal, 114 Pa. St. 505; 7 Atl. 180.

The decision in the equity suit was passed only after the case had been fully tried and submitted. The plaintiff knew of the fraud of which it complained more than six years before instituting suit. Having the privilege of choosing between two remedies, one of which was perfectly safe against the defense of the statute of limitations, plaintiff elected to pursue a suit for rescission, which could only be commenced by averring that plaintiff did not learn of the fraud for many years. That plaintiff so pleaded is cogent proof that plaintiff made its election of remedies with entire knowledge of the statute and its possible effect on the litigation. Plaintiff is bound by its election.

Stokes v. Wright, 20 Ga. App. 325; 93 S. E. 27.
Black v. Miller, 75 Mich. 23; 42 N. W. 837.

II

Under the practice in the federal courts plaintiff is doubly bound by its election. After the defense of the statute of limitations had been pleaded against the complaint to cancel patents, and even after the evidence in support of that defense had been taken, plaintiff had an election to continue the equity suit, or to change to the lawside of the court. Adherence to the original election until after decree is fatal to plaintiff's present action.

Both by Congressional Act and by Supreme Court rule a sort of *locus penitentiae* has been created which removes any possible harshness of the doctrine requiring an election between inconsistent remedies, and yet retains the wholesome purpose of the doctrine of election.

Rule 22 was promulgated before the equity suit was at issue:

"If at any time it appear that a suit commenced in equity should have been brought as an action on the law side of the court, it shall be forthwith transferred to the law side and be there proceeded with, with only such alteration in the pleadings as shall be essential."

Thereafter and during the year before decision in the cancellation suit, Congress passing the following:

"In case any of said courts shall find that a suit at law should have been brought in equity or a suit in equity should have been brought at law, the court shall order any amendments to the pleadings which may be necessary to conform them to the proper practice. Any party to the suit shall have the right, at any stage of the cause, to amend his pleadings so as to obviate the objection that his suit was not brought on the right side of the court. The cause shall proceed and be determined upon such amended pleadings. All testimony taken before such amendment, if preserved, shall stand as testimony in the cause with like effect as if the pleadings had been originally in the amended form."

U. S. Compiled Statutes 1916, Sec. 1251a.

If plaintiff is not bound by the election manifested by instituting the suit to cancel patents because there existed a good defense of which plaintiff knew, but the invocation of which was optional with defendants (something we do not concede) the plaintiff was again put to its election *after defendants invoked the defense of the statute.*

The equity rule and the statutory provision, we submit, were passed for the purpose of preserving to a defendant the protection afforded by the doctrine of election of remeides, and in express recog-

nition of the value of that doctrine, but with the view to permitting a plaintiff to save himself from any of the harsh effects of that doctrine if he did so in such manner as to subject the defendant to but one litigation.

Friederichsen v. Renard, 247 U. S. 207; 62 L. Ed. 1075, 1083.

In this case a man, who had been induced by fraud to exchange property with another, sued to rescind the contract. *While this suit was pending* he cut some timber from the property which he had received in exchange. When this developed, of course it meant that he had by his conduct estopped himself to rescind the contract, and thereupon the court ordered the case transferred to the law docket with permission to amend and proceed as in an action at law. The decision gives full effect to Equity Rule 22 and the Act of March 3, 1915, above referred to. The court held that the proceeding on the law side was not the institution of a new suit, but was a mere incident in the progress of the original case.

> "It is settled upon reason and authority that the conversion of a suit in equity into an action at law or vice versa is not alone sufficient to constitute the beginning of a new action, and that, with respect to the Statute of Limitations, it is a mere incident in the progress of the original case."

And further grounded its decision upon the statement:

> "The 'amended petition' was not filed by petitioner's counsel of their own motion, but on the order of the court, entered in its discretion, to promote the ends of justice.

"Thus, we are brought to the conclusion that since the two remedies asserted by the petitioner were alternative remedies, and since the order made, requiring the conversion of the suit in equity into one at law, was entered by the court sitting in chancery, for us to affirm the judgment of the circuit court of appeals that the petitioner, *in obeying the order of the trial court,* made a fatal choice of an inconsistent remedy, would be to subordinate substance to form of procedure, with the result of defeating a claim which the respondents stipulated had been sufficiently established to justify a verdict against them. This we cannot consent to do."

This case serves to accentuate the point we have been urging throughout this brief, to-wit, the doctrine of election of remedies is not based upon catch phrases or doctrinaire reasoning, but it is based upon the principle that a defendant may not be vexed by repeated litigations upon the same state of facts, and to that end the court will permit, and, in the rescission suit, would have permitted the case to be shifted to that side of the court which the facts seemed to warrant. *(Fay v. Hill, 249 Fed. 415, 418; Equitable Trust Co. v. Denver & R. & G. Co., 250 Fed. 327, 340.)* There is no objection to that upon the basis of election. The objection here is that the plaintiff did not do that which the law said it could do, but it speculated upon what the court would do, refused to obey the road sign so plainly posted by Equity Rule 22 and the Act of March 3, 1915, and then when the case went against it undertook to do that which the law says its cannot do, to-wit, it undertook to subject the defendant to a second and inconsistent litigation upon the same facts.

CASES CITED BY PLAINTIFF

Northern Assurance Co. v. Grand View Building Assn., 203 U. S. 105; 51 L. Ed. 109.

In an action to recover upon an insurance policy the court held that a waiver of conditions appearing upon the face of the policy could not be proved by parol in an action at law. Thereafter a suit in equity was brought to reform the contract so that it would conform to the terms claimed in the waiver and for recovery upon the policy as reformed. The right to bring the second suit was upheld and, indeed, there was no election of remedies involved because both suits proceeded upon the theory of affirmance of the contract.

Bierce v. Hutchins, 205 U. S. 340; 51 L. Ed. 828.

Plaintiff sold personal property on a contract which left title in the plaintiff. Thereafter he brought suit to enforce a lien against the property, but dismissed before judgment. Later he brought a suit to recover the property. It was very properly held that there was no election because a remedy to enforce a lien had never existed as the plaintiff himself owned the property.

Bistline v. United States, 229 Fed. 546.

This case does not support plaintiff's contention. It was a suit to cancel patent in which defendant's answer disclosed that the land had been transferred to an innocent purchaser *before suit.* Under the statute the government had no right against the innocent holder. The government did not know the facts when the suit was instituted. The suit was im-

mediately dismissed. The suit was started without knowledge of the facts, which alone takes it out of the principle of election of remedies.

Agar v. Winslow, 123 Cal. 587; 56 Pac. 422.

In this case plaintiff, holding title to property as trustee, brought an action in unlawful detainer. It appeared that prior to that time he had instituted an action in ejectment but the defendant was in possession of the property under a subsisting lease and there never was a right to sue in ejectment. Therefore the court held that that attempt was to pursue a remedy which never had existed and therefore would not bar the right to pursue a remedy to which the plaintiff was entitled. The case is clearly distinguishable from the one at bar.

McLaughlin v. Austin, 104 Mich. 489, 491; 62 N. W. 719.

Here a lien for labor and material was filed against a contractor when the debt was due from the building owner. It did not involve inconsistent remedies against the same person. A lien asserted against A could not constitute an election between inconsistent remedies against B.

McElmoyle v. Cohen, 13 Pet. 312, 326; 10 L. Ed. 177.
Townsend v. Jemison, 9 How. 406, 412; 13 L. Ed. 194.
Cromwell v. County of Sac., 94 U. S. 351, 352.

The instant case does not involve *res adjudicata* nor whether the statute of limitations applicable to litigation is the law of the forum or the *lex loci contractus.*

Tullos v. Mayfield (Tex. Civ. App.), 198 S. W. 1073.

Careful consideration of the foregoing case will, we believe, be conclusive that it is not authority for the contention that an election is not conclusive if the suit in which it is made fails because of the successful defense of the statute of limitations pleaded in the answer, and which is made an issue that is decided after a trial upon the merits. In this case there had been tried a suit in trespass to try title to recover the superior title to land which had been sold and for which purchase price notes were given. This suit failed because of the statute of limitations. Thereafter an action was instituted on the notes, and as stated by the court it was "an entirely different cause of action." To our mind the distinction is very clear. To invoke the doctrine of election of remedies the suits involved must have been based upon one cause of action. There is a very keen distinction between a cause of action and remedial right (*Pomeroy's Code Remedies, 4th Ed., Sec. 348, page 462*). In the Tullos case the court points out very clearly that the notes were not involved in the first law suit.

There is, however, another distinction which, to our mind, destroys the value of this case as an authority for plaintiff. When the *right* is created by statute no remedy exists unless the plaintiff brings his cause of action within the conditions created by statute, and as to such a complaint it is not necessary for the defendant to plead the statute of limitations as a defense. Where, however, the right claimed by plaintiff is one which existed independent of statute, then the statute of limitations becomes a defense that must be pleaded and proved.

In the first instance the remedy does not exist until the plaintiff pleads and proves the condition precedent imposed upon him by the statute creating the right, and if he cannot so plead and prove the remedy did not exist when his suit was filed. In the second instance the remedy does exist when the suit is filed and continues to exist until the defense is established.

At common law the action of trespass to try title to real estate did not exist, but in Texas it is a statutory right *(21 Ency. Pl. & Practice 925, 931; Thomas v. Lock, 66 Tex. 383, 1 S. W. 112, 114).*

Therefore we submit that the Texas case comes within the rule, that where the right claimed exists only by virtue of statute, the statute of limitations ceases to be a defense to be pleaded, but the initial pleader must bring his case strictly within all of the conditions of the statute, which are conditions precedent to the right, and if he cannot do so the right itself does not exist.

It was asserted in the court below, and we presume will be asserted here, that this court has in a recent decision practically repudiated the doctrine of election of remedies. We think this was not the intention of this court, and that our position in this regard is supported by the history of that litigation. The decision referred to is

Southern Pacific Company v. Bogert, 250 U. S. 483; 63 L. Ed. 1099.

In our judgment this case belongs in that class of cases holding that if the plaintiff did not have a choice between two eixsting remedies there was not an election. This case does not repudiate the doctrine of election of remedies and does not approve

the principle that would permit a plaintiff to speculate upon the court's decision until he loses and then come into court and assume a position entirely inconsistent with that first taken. It is true the court uses this language:

> "There is no basis for the claim of estoppel by election; nor any reason why the minority who failed in the attempt to recover on one theory because unsupported by the facts should not be permitted to recover on another for which the facts afford ample basis."

But it is to be noticed that the court does not say that a plaintiff may successively come into court upon inconsistent theories. In view of other expressions in the opinion it is very plain that the court decided nothing more than that if the remedy first pursued had never in fact existed a fruitless pursuit of that remedy would not constitute an election that would foreclose a remedy that did exist.

The case was a suit by minority stockholders in their rights as individuals to charge the Southern Pacific Company as trustee of certain stock which that company as majority stockholder had obtained against the rights of the minority stockholders. There had been a great deal of litigation preceding the case which finally reached the Supreme Court, and from which we have quoted. The facts were that the Houston & Texas Central Railway Company was dominated by the Southern Pacific Company as the holder of a majority of its stock. The Houston Company had a number of bond issues outstanding secured by mortgages upon its property, and in suits to foreclose these mortgages the mortgagor had interposed defenses. In 1888 a reorgan-

ization agreement was entered into, by the terms of which the Houston & Texas Central Railroad Company was organized. New bonds were issued and under the decree foreclosing the mortgages a trustee was appointed who should work out a scheme of distributing the stock in the new company to the extent at least of determining the assessment to be paid by those who received the stock. The reorganization agreement, however, provided that the Southern Pacific Company should receive all of the stock not taken up by the minority stockholders upon a basis more favorable than that offered to the minority stockholders. After this decree was entered it was assailed by the minority stockholders unsuccessfully, and thereafter suits were brought in the state court of New York unsuccessfully. Finally a suit was brought in the state court which was removed to the federal court and resulted in the decision of the Supreme Court above cited.

We deem it advisable to present the history of this litigation, and in doing so, to separate our reference to these cases into those originating in the federal court and those originating in the state court, and in turn the decisions of the federal court will be divided into those initiated in the litigation finally determined in this case and those which preceded this litigation.

Lawrence v. Southern Pacific Co., 177 Fed. 547.

After unsuccessful litigation in the state court of New York an action was there instituted and upon motion removed to the federal court. It first appears in the federal reports upon a motion to remand, which was denied. (See 165 Fed. 241.)

This was in 1908. In 1910 the case came up upon a motion to dismiss because the defendant, Houston & Texas Central Railway Company, had not been served and a trustee had died. The case is important because it sets forth the purpose for which the suit was brought and makes plain that it was not a suit by the minority stockholders representing themselves and to recover something for themselves individually, but was a suit brought in behalf of the corporation, of which they were minority stockholders.

Lawrence v. Southern Pacific Co., 180 Fed. 822.

This was a renewal of the motion to dismiss in the case last cited because the suit was in behalf of the corporation and the corporation was not made defendant. The court again states its view as to the purpose of this suit in the following language:

> "The plaintiff does not seek to recover a share of the profits of any of the transactions of the corporation or its majority stockholders. He does not seek to obtain damages, nor is there any theory shown upon which he can prove damage to his property, nor as to which an accounting would result in a decree in which compensation could be computed upon the plaintiff's rights as distinguished from his ultimate position as a stockholder in the absent corporation. It would seem to be necessary to hold, therefore, that this action cannot proceed without the presence of the Houston & Texas Central Railway Company as a party thereto. Nor can it be urged that this railway company can be aligned as anything but a defendant, and therefore entitled to representation upon any trial. It is the real party in interest if the sales of its property were invalid, and it is accused of the wrong-doing by which its property was sold."

And because the court entertained this view an order of dismissal was entered. An attempt was made to appeal this case direct to the Supreme Court of the United States, where it was held that an appeal from the order of dismissal would not lie. (*Bogert v. Southern Pacific Co., 228 U. S. 137; 57 L. Ed. 768*). After the decision in the lower court Lawrence died and Bogert was substituted as administrator of his estate.

Bogert v. Southern Pacific Co., 215 Fed. 218.

A new complaint was filed after the decision of the Supreme Court refusing to review the order dismissing for want of parties (the case referred to above as reported in 180 Fed. 822), and in this new complaint for the first time the plaintiff asserted that the wrongful acts complained of were the positive acts of the parties defendant and based plaintiff's right to an accounting upon allegations of injury to his own property. The decision is important in that for the first time the action is based upon a right in the plaintiff individually and not in the corporation for which he sued as a minority stockholder. Also this decision sets forth chronologically the various law suits preceding it.

Bogert v. Southern Pacific Co., 226 Fed. 500.

Here the court grants to plaintiff the relief asked in the earlier case last above referred to, holding that the Southern Pacific Company was a trustee for the interests of the minority stockholders; that the foreclosure decree was valid insofar as it passed a clear title to the Southern Pacific Company and left to future determination the amount to be paid

by the minority stockholders, but held that this future act when performed was so unfair that it opened the way for the individual stockholders to assert that the Southern Pacific Company was a trustee for them.

Bogert v. Southern Pacific Co., 244 Fed. 61.

In this case the Circuit Court of Appeals affirmed the conclusion reached by the District Court in the case last above cited, and denied the plea that plaintiff should not be permitted to prevail because he had made an inconsistent election in earlier cases, pointing out that the claims in the various suits were not inconsistent or opposite; that the earlier cases were not brought by plaintiff individually but were brought in behalf of a corporation, the recalcitrant majority of which declined to bring the suit.

> "The grievance alleged in these prior suits was a corporate grievance, viz: that the foreclosure of the mortgages on the railway company's various lines had been brought about fraudulently by the Southern Pacific Company. The merits were not passed upon in any of these cases, each being dismissed on the ground that the decree of foreclosure could not be attacked collaterally because there was no proof of fraud, and in the last case *supra* because the railway company was an indispensable party. * * *
>
> "Then it is argued that the complainant is concluded by virtue of an election between inconsistent remedies, to-wit, because the earlier suits of which he was a promoter, proceeded on the ground of fraud, whereas this suit goes on the ground of an implied trust. But there was no election. *These claims were not opposite and irreconcilable.*"

This view of the Circuit Court of Appeals, which was approved by the Supreme Court in the principal case of *Southern Pacific Company v. Bogert, 250 U. S. 483; 63 L. Ed. 1099,* which is now under discussion, should put an end to the contention that the Supreme Court in its decision in any way departed from its long maintained position as to election of remedies. Some language used by the Supreme Court indicates its approval of the view of the Circuit Court of Appeals that the earlier suits were representative suits and therefore not to be charged as an election by the individual.

> "The minority stockholders do not complain of a wrong done the corporation or of any wrong done by it to them. They complain of the wrong done them directly by the Southern Pacific, and by it alone. The wrong consists in its failure to share with them, the minority, the proceeds of the common property of which it, through majority stock holdings, had rightfully taken control. * * *
>
> "This suit was not begun until July 26, 1913; and not until that time was there a proper attempt to assert the specific equity here enforced; namely, that the Southern Pacific received the stock in the new Houston Company as trustee for the stockholders of the old. * * *
>
> "The Southern Pacific also urges that the suit must fail because the old Houston Company is an indispensable party and has not been joined. The contention proceeds upon a misconception of the nature of the suit. Since its purpose is merely to hold the Southern Pacific as trustee for the plaintiffs individually of the property which it has received, the old Houston Company is in no way interested and would not be even a proper party."

The cases in the federal court preceding Bogert v. Southern Pacific Company in no instance asserted a personal right in the minority stockholders. We refer to them.

Carey v. Houston & Texas Central Ry. Co.,
45 Fed. 438.

A year after confirmation of the sale under foreclosure of the properties of the Houston & Texas Central Railway Company, Carey and other minority stockholders in that railway company instituted a suit for the purpose of impeaching this decree, and the above decision reports the case upon an application for injunction *pendente lite.* The case is important only in that it sets forth the issues tendered by the plaintiffs and the facts surrounding the original decree and foreclosure.

Carey v. Houston & Texas Central Ry. Co.,
52 Fed. 671.

This case reports the case last cited at trial on the merits and dismisses the bill, holding that there was no fraud in the original foreclosure sale. It is to be noted that in each of these cases the proceeding was one to retain title to the property in the Houston & Texas Central Railway Company and not to establish any personal right in plaintiffs.

Carey v. Houston & Texas Central Ry. Co.,
150 U. S. 170; 37 L. Ed. 1041.

This is the same case referred to in the last two citations on appeal to the Supreme Court. The appeal was dismissed because it was not appealable direct to the Supreme Court of the United States.

The decision is interesting chiefly because it points out that the effort of plaintiffs was to intervene in the original foreclosure suit and make defenses that the corporation through its majority control refused to make.

Carey v. Houston & Texas Central Ry. Co., 161 U. S. 115; 40 L. Ed. 638.

This case is upon appeal from decree of the Circuit Court of Appeals affirming the decree of the Circuit Court dismissing plaintiff's bill above referred to as appearing at 52 Fed., page 671. The court in dismissing the appeal points out that this suit by Carey is not an independent suit but is to be considered as a part of the original foreclosure suit, and as such we deem that it could not be held to be an election of remedies based upon decree in that suit.

The foregoing cases indicate the effort made by the minority stockholders to secure redress by intervention in the original foreclosure litigation, and plainly show that here there was no election, as the suits were all a part of the original litigation and the effort of Carey was made in behalf of the corporation.

The litigation in the state courts of New York is found in *Gernsheim v. Olcott, 7 N. Y. Supp. 872,* which was a suit brought in behalf of the corporation, and two appeals of that case *(Gernsheim v. Olcott, 10 N. Y. Supp. 438, Gernsheim v. Central Trust Co., 16 N. Y. Supp. 127)* and in *MacArdell v. Olcott, 70 N. Y. Supp. 930,* which again was a suit in behalf of the corporation, and two appeals thereof *(MacArdell v. Olcott, 93 N. Y. Supp. 799; 104 App.*

Div. 263; MacArdell v. Olcott, 189 N. Y. 368; 82 N. E. 161). In the last mentioned case in the appellate court, the opinion holds the action to be a representative action in behalf of the corporation, and answered the contention that it was a personal action to impress a trust with this statement, referring to the complaint:

> "It does not comprehend within its scope the cause of action by minority stockholders to impress a trust upon property acquired by a majority stockholder, which appellants are now urging."

We have gone to the above length in the case of Bogert v. Southern Pacific Company, and of the cases leading up to that decision, because we feel that those earlier cases point out conclusively that the Supreme Court was not departing from the established rule of law that an election of one of two co-existing and available remedies that are opposite and inconsistent is a waiver of the other. That court had so held in earlier cases, and that is the holding of the state and federal courts generally. It is apparent, especially in the light of the decision of the Circuit Court of Appeals which it was reviewing, that what the court decided is: (a) the Bogert case did not involve election of remedies because Bogert had never theretofore elected, all previous suits and actions having been brought in behalf of the corporation; (b) there was no election of remedies because the several proceedings which preceded the Bogert case were not irreconcilable with the Bogert case; and (c) the case came within the well recognized exception that exists where the first effort is to pursue a remedy that

never had existed because the Houston & Texas Central Railway Company had never had a right to disaffirm the reorganization.

Otherwise stated, the situation is analagous to a case where a defendant is charged with negligence, injuring one party and killing another. The former is appointed administrator of the latter's estate and litigates his claim. Whatever the result of that litigation, it cannot affect the right of the party injured to assert his individual claim for damages, although this claim is based on the same negligent act as that on which the administrator predicates his right to recover.

The assertion by Lawrence and Bogert of a claim alleged to exist in favor of the Houston & Texas Central Railway Company could not estop them to assert a claim arising in favor of Lawrence individually.

In the case at bar the United States in its proprietory capacity is plaintiff. The United States in the same capacity was plaintiff in the previous case. The same acts are alleged as the foundation of plaintiff's right of recovery in this case as were alleged in the former litigation. The same injury is relied on as the consequence of these acts, to-wit: the fraudulent acquisition of United States lands.

Under the facts plaintiff had an election of remedies. It could claim either lands or damages; it was certainly not entitled to both. With full knowledge of the facts and with the knowledge that defendant was pleading the statute of limitations, and with the right to have the case, therefore, go to the law docket in order to save defendant that injury which the law says he should not be subjected to

when it enforces the doctrine of election of remedies, and yet preserve to plaintiff an insurance against loss because of any uncertainty as to the course it should pursue, plaintiff elected to follow to judgment the remedy of rescission.

III.

This is a common law action for damages in which the United States in its proprietary capacity is suing for the value as damages of the land alleged to have been fraudulently obtained. There is no statute governing the action and the common-law measure of damages is applicable—the difference between the price paid and the actual value of the land at the time of sale.

That this is a common-law action, existing independent of statute, has been decided by this court.

United States v. Whited & Wheless, 246 U. S. 552; 62 L. Ed. 879.

United States v. Koleno, 226 Fed. 180.

The rights of the United States, suing as a landed proprietor, should be determined by the same rules that would govern if both parties were private litigants.

United States v. Stinson, 197 U. S. 200, 204; 49 L. Ed. 724.

United States v. Detroit Timber & Lumber Co., 131 Fed. 668, 677; 67 C. C. A. 1, 10; affirmed 200 U. S. 321; 50 L. Ed. 499.

United States v. Chandler-Dunbar Water Power Co., 152 Fed. 25; 81 C. C. A. 221; affirmed 209 U. S. 447; 52 L. Ed. 881.

United States v. Midway Northern Oil Co., 232 Fed. 619, 631.

United States v. Debell, 227 Fed. 775, 779; 142 C. C. A. 299.

State of Iowa v. Carr, 191 Fed. 257, 266; 112 C. C. A. 477.

The measure of damages in an action for fraudulently acquiring title to land is the difference between the price paid and the value of the land.

Sigafus v. Porter, 179 U. S. 116; 45 L. Ed. 113, 118.
King v. Lamborn, 186 Fed. 21.
Nupen v. Pearce, 235 Fed. 497.
Atwater v. Whiteman, 41 Fed. 427.
Glaspell v. No. Pac. R. R. Co., 43 Fed. 900, 905.
Smith v. Bolles, 132 U. S. 125; 33 L. Ed. 279.
Wilson v. New United States Cattle-Ranch Co., 73 Fed. 994.
Rockefeller v. Merritt, 76 Fed. 909.
Simon v. Goodyear Metallic Rubber Shoe Co., 105 Fed. 573.
Trenchard v. Kell, 127 Fed. 596; 142 Fed. 16.
Stratton's Independence, Ltd., v. Dines, 135 Fed. 449, 459. (Certiorari denied 197 U. S. 623; 49 L. Ed. 911.)
Pittsburg Life & Trust Co. v. No. Central Life Ins. Co., 140 Fed. 888.
Tooker v. Alston, 159 Fed. 599.
Chandler v. Andrews, 192 Fed. 543.

This rule had been applied in an action by the United States similar to the instant case.

Pitan v. United States, 241 Fed. 364.

As we understand the position of plaintiff, it is that a different rule should obtain because of the

provision of the timber and stone act which we quote:

> "* * * and if any person taking such oath shall swear falsely in the premises he shall be subject to all the pains and penalties of perjury, and shall forfeit the money which he may have paid for said lands, and all right and title to the same; and any grant or conveyance which he may have made, except in the hands of bona fide purchasers, shall be null and void."
>
> *Sec. 4672 U. S. Comp. Stat. 1916; Act June 3, 1878, c. 151, sec. 2.*

This act has been construed to relieve the government from the necessity of tendering back the purchase price in suits to cancel patents fraudulently obtained *(Causey v. United States, 240 U. S. 399, 402; 60 L. Ed. 711; United States v. Minor, 114 U. S. 233, 238; 29 L. Ed. 1010),* but such suits come within the purview of the statute.

The point here involved is not touched by *Emmons v. United States, 175 Fed. 514,* cited by plaintiff. That was an action to recover the moneys paid by entrymen *on entries which had been canceled by the department for fraud.* Under the statute the forfeiture carried loss of the money paid.

It is our position that this statute covers purely a statutory remedy for forfeiture and is applicable only to proceedings under the statute, which deals entirely with cancellation of the patent. In a suit to cancel a patent for fraud undoubtedly the government would not have to pay back the money which had been paid by the entrymen, and we apprehend that this statute was passed with a view to preventing the necessity of tendering back the purchase

price in such suits. The case at bar is not an action upon the statute, but is a common law action for the recovery of damages, and the rule in the federal courts as well as the state courts has uniformly been that the measure of damages in an action of this kind is the difference between the price paid for the land and the actual cash market value thereof.

CONCLUSION

We submit that both questions should be answered in the affirmative.

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